IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

FRIDAY, THE 1ST JUNE 2007 / 11TH JYAISHTA 1929

RSA.No. 405 of 2007()

AS.195/2004 of ADDL. DISTRICT COURT-II, KOZHIKODE
OS.590/2001 of ADDL.M.C.,KOZHIKODE-I

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: APPELLANT/APPELLANT/2ND DEFENDANT

NAALAM VEETTIL BALAKRISHNAN,
S/O KANNAN, TEACHER, PUNNASSERY AMSOM,DESOM,
KOZHIKODE.

BY ADV. SRI.R.BINDU (SASTHAMANGALAM)

RESPONDENTS: RESPONDENTS/PLAINTIFF & DEFENDANTS 1 & 3 TO 5

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1. NAALAM VEETTIL SARADA, D/O KANNAN,
ARANGATTU VEETTIL, NOCHAD AMSOM,
KALPATHUR DESOM, KOYILANDY TALUK.

2. NAALAM VEETTIL NARAYANI AMMA,
W/O KANNAN, CHETTIYAM POYIL, PUNNASSERY AMSOM AND
DESOM, KOZHIKODE TALUK.

3. NAALAM VEETTIL DEVAKI, D/O KANNAN,
CHETTIYAM POYIL, PUNNASSERY AMSOM AND DESOM,
KOZHIKODE TALUK.

4. NAALAM VEETTIL KARTHIAYANI, D/O KANNAN,
KELAPPAN KANDIYIL, BALUSSERY AMSOM,
PUTHUR VATTAM DESOM, KOYILANDY TALUK.

5. NAALAM VEETTIL PREMAKUMARI,
D/O KANNAN, BALUSSERY AMSOM AND DESOM,
KOYILANDY TALUK.

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 01/06/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

Order on I.A.No.899/2007 in R.S.A. No.405/2007

1.6.2007 Dismissed Sd/- M.Sasidharan Nambiar
Judge

/true copy/

P.S. To Judge

M.SASIDHARAN NAMBIAR,J.

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R.S.A. NO.405 OF 2007

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Dated this the 1st day of June,2007

JUDGMENT

Second defendant in O.S.590/2001 on the file of Additional Munsiff Court I, Kozhikode is the appellant. First respondent is the plaintiff and other respondents the other defendants. First respondent instituted the suit seeking a decree for partition of the properties left behind by deceased Kannan, the father of appellant and respondents 1 and 3 to 5. First respondent claimed 1/6 share in the plaint schedule properties. Appellant resisted the suit contending that Kannan had transferred major portion of his properties in favour of the plaintiff and other defendants and executed Ext.B10 Will on 9.11.1987 and he has bequeathed the properties in favour of the appellant and therefore the plaint schedule properties belong to the appellant exclusively and it is not available for partition. Learned Munsiff framed the necessary

issues. On the evidence of PW1, DW1 and DW2 Exts.A1 and B1 to B12, learned Munsiff found that Ext.B10 Will is not genuine and it was not executed by deceased Kannan and appellant is not entitled to claim any right under Ext.B10 and on the death of Kannan, his rights devolved on all the legal heirs including appellant and first respondent. A preliminary decree for partition was passed directing division of the plaint schedule properties into six shares and allotment of one such share to first respondent. Appellant challenged the decree and judgment before District Court, Kozhikode in A.S.195/2004. Learned District Judge on reappreciation of evidence confirmed the findings of the learned Munsiff and dismissed the appeal. It is challenged in this Second Appeal.

2. Learned counsel appearing for appellant was heard.

3. The arguments of learned counsel appearing for appellant was that first Appellate Court did

not confirm the finding of the learned Munsiff with regard to the genuiness of Will and only upheld the finding that appellant did not get any right under Ext.B10 and in fact all the suspicious circumstances surrounding execution of the Will namely disinheriting the other legal heirs were properly explained by the appellant as sufficient properties were given to the other legal heirs by the father during his life time and what was left with the deceased father was only the plaint schedule properties and they were bequeathed to the appellant under Ext.B10 Will and evidence of DW2 the attesting witness establish the execution of the Will and in such circumstances, courts below should have upheld Ext.B10 Will and found that plaint schedule properties are not available for partition.

4. On hearing learned counsel appearing for appellant and on the facts and evidence as is clear from the judgments of the court below, I find no

substantial question of law involved in the appeal.

5. The plaint schedule properties admittedly belonged to Kannan and if Kannan died, intestate plaintiff and defendants 1 to 5 are admittedly entitled to get equal shares. The only question is whether Ext.B10 Will was genuine and was executed by deceased Kannan out of his free will and volition. The execution and genuineness of Ext.B10 Will was disputed. In such circumstances, burden is heavily on the appellant to establish that it is a genuine last Will executed by deceased Kannan out of his free will and volition. Being the propounder it is his duty to explain all the suspicious circumstances surrounding the execution of the Will. Ext.B10 contains not only the signature but also the thumb impression of the deceased. Though it could be said that comparison of handwriting has not reached the exactitude, that is not the case with thumb impression. Thumb impressions of two persons will not tally. Ext.B10

contains the thumb impression of the deceased. As its genuineness is disputed, a comparison of the thumb impression in Ext.A1 with the admitted thumb impression of the deceased in Ext.A1 would have concluded whether the thumb impression seen in Ext.B10 is that of the deceased or not. Even before the trial court, Ext.A1 a sale deed executed by the deceased Kannan on 5.10.1986 which contained the thumb impression and signature of Kannan was available. The appellant could have sent Exts.B10 and A1 to a handwriting expert for comparison and obtained a report on the identity of the thumb impression of the deceased Kannan seen in Ext.B10. No attempt was made before the trial court. Learned Munsiff on a verification of Ext.B10, found that the paper used for preparing Ext.B10 and the ink used for writing Ext.B10 all reveal that they were not in existence in 1987 and are of recent origin. In such circumstances, courts below held that Ext.B10 is not a genuine Will executed by

deceased. Ext.B10 was therefore discarded. In the light of that factual findings, I do not find any substantial question of law involved in this appeal.

Appeal is dismissed in limine.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006